Case No. S168047

IN THE

Supreme Court of the State of California

KAREN L. STRAUSS et al.

Petitioners,

v.

MARK B. HORTON as State Registrar of Vital Statistics, etc. et al.,

Respondents,

DENNIS HOLLINGSWORTH et al.,

Interveners.

INTERVENERS' OPPOSITION BRIEF

ERIN M. BERNSTEIN (State Bar No. 231539)
245 E. Liberty, Suite 300
Walnut, CA 91789-3005
Telephone: (310) 506-4623
Facsimile: (310) 506-4266

ANDREW P. PUGNO (State Bar No. 206587)
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Dr. Ste. 100
Folsom, CA 95630-4726
Telephone: (916) 608-3065
Facsimile: (916) 608-3066
Email: andrew@pugnolaw.com

Attorneys for Interveners

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INTERVENERS' OPPOSITION BRIEF

KENNETH W. STARR (Bar No. 58382)
24569 Via De Casa
Malibu, CA 90265-3205
Telephone: (310) 506-4621
Facsimile: (310) 506-4266

ANDREW P. PUGNO (Bar No. 206587)
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Dr Ste 100
Folsom, CA 95630-4726
Telephone: (916) 608-3065
Facsimile: (916) 608-3066
Email: andrew@pugnolaw.com

Attorneys for Interveners

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ISSUES PRESENTED

By order dated November 19, 2008, this Court directed that the following issues be briefed:

1. Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution?

2. Does Proposition 8 violate the separation of powers doctrine under the California Constitution?

3. If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?

FACTS

Interveners are the Official Proponents of Proposition 8 – Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, and Mark A. Jansson (hereafter "Official Proponents") – and ProtectMarriage.com - Yes on 8, a Project of California Renewal, FPPC ID #1302592, the official campaign committee in favor of Proposition 8 (hereafter collectively "Interveners").

From the beginning of California statehood, the legal institution of civil marriage has been consistently understood as a union of a man and a woman. (*In Re Marriage Cases* (2008) 43 Cal.4th 757, 792 (hereafter *Marriage Cases*).) Whenever there have been challenges to that basic definition, the people have responded through the democratic process to preserve it.

In the mid-1970's, several same-sex couples sought marriage licenses and were denied. The Legislature responded in 1977 by amending the marriage law to expressly state that California statutes authorize marriage only between a man and a woman. (*Marriage Cases, supra*, 43 Cal.4th at p. 795.) For two decades, that basic definition remained

essentially unchallenged. But as the debate over marriage for same-sex couples began in earnest, especially in litigation in other states, the people of California again acted – this time directly. In March 2000, the people approved Proposition 22, which added Section 308.5 to the Family Code:

> *Only marriage between a man and a woman is valid or recognized in California.*

(Former Fam. Code, § 308.5, added by initiative measure, Prop. 22, § 2, eff. Mar. 8, 2000.)

On February 12, 2004, the City and County of San Francisco disregarded state law and began issuing marriage licenses to same-sex couples on the ground that the traditional definition was unconstitutional. (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1071 (hereafter *Lockyer*).) This Court later voided those marriages, but left open the question whether limiting marriage to opposite-sex couples was constitutional. (*Id.* at p. 1120.) While *Lockyer* was pending, several direct constitutional challenges to the opposite-sex definition of marriage were filed in superior court and later coordinated as the *Marriage Cases*. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 786.)

Anticipating the possibility that the *Marriage Cases* could result in Proposition 22 being invalidated, on October 5, 2007 the Official Proponents began the legal process of proposing an initiative amendment (ultimately Proposition 8) to add to the California Constitution the identical 14 words previously enacted by Proposition 22. (Request for Judicial Notice in Support of Interveners' Opposition Brief, filed herewith, at Exh. 1 (hereafter "Interveners' RJN").) On April 24, 2008, the Official Proponents timely submitted completed petitions bearing far more than the required number of signatures to qualify Proposition 8 for the ballot. (See Motion to Intervene as Real Parties in Interest by Proposition 8 Official Proponents, et al., filed herein 11/17/2008, at Exh. A (Decl. of Dennis

Hollingsworth), p. 4, ¶ 20.) On June 2, 2008, the Secretary of State declared Proposition 8 officially qualified for the November 4, 2008 ballot. (Interveners' RJN at Exh. 2.)

On May 15, 2008, this Court issued its decision in the *Marriage Cases*, holding that statutes limiting "marriage to a union 'between a man and a woman' [are] unconstitutional." (*Marriage Cases*, *supra*, 43 Cal.4th at p. 857.) Seeking to allow the people time to decide the issue and to avoid confusion, on May 22, 2008, the Proposition 22 Legal Defense & Education Fund and others requested a stay of the effective date of the *Marriage Cases* decision until after the vote on Proposition 8. (See, e.g., S147999, Petition For Rehearing, filed herein 5/22/2008.) This Court denied the request on June 4, 2008, and on June 16, 2008 the *Marriage Cases* decision took effect. (Interveners' RJN at Exh. 3.)

Meanwhile, as part of the official initiative process, the people were provided with official information about Proposition 8 to assist them in making their decision. In the General Election Voter Information Guide, the Attorney General stated the official title and summary of Proposition 8 as follows:

> **ELIMINATES RIGHT OF SAME–SEX COUPLES TO MARRY. INITIATIVE CONSTITUTIONAL AMENDMENT.**
>
> - Changes the California Constitution to eliminate the right of same-sex couples to marry in California.
> - Provides that only marriage between a man and a woman is valid or recognized in California.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2008) Official Title and Summary of Prop. 8, p. 54; Interveners' RJN at Exh. 4.) The Legislative Analyst's Office prepared a Ballot Analysis for Proposition 8 which was included in the voter information guide. It stated:

> This measure amends the California Constitution to specify that only marriage between a man and a woman is valid or recognized in California. As a result, notwithstanding the California Supreme Court ruling of May 2008, marriage would be limited to individuals of the opposite sex, and individuals of the same sex would not have the right to marry in California.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2008) Analysis by the Legislative Analyst of Prop. 8, p. 55; Interveners' RJN at Exh. 5.)

Both the Official Proponents and various opponents of Proposition 8 submitted arguments and rebuttal arguments for the voter information guide. The arguments submitted by the Official Proponents informed the voters that Proposition 8 would preclude recognition of same-sex marriages regardless of the timing or location of such marriages:

> Your YES vote on Proposition 8 means that only marriage between a man and a woman will be valid or recognized in California, *regardless of when or where performed.* But Prop. 8 will NOT take away any other rights or benefits of gay couples.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2008) Rebuttal to Argument Against Prop. 8, p. 57, italics added; see Interveners' RJN at Exh. 6.)

After a vigorous public debate, on November 4, 2008, the people of California approved Proposition 8 as an amendment to the state Constitution, thereby restoring the definition of marriage to its traditional meaning. (Interveners' RJN at Exh. 7.) As constitutionally provided, on November 5, 2008, at 12:00 a.m., Proposition 8 took full effect. (Cal. Const., Art. XVIII, § 4.) Article I, section 7.5 now states:

> *Only marriage between a man and a woman is valid or recognized in California.*

Later that same day, petitioners filed the present action seeking to invalidate Proposition 8. On November 19, 2008, this Court denied the request for stay, granted the Official Proponents' motion to intervene, and directed the parties to brief three issues.

INTRODUCTION

In the rich and storied history of California, and in the many decades of our state's jurisprudence, one unifying principle serves as the foundation for our life together in community. It is an abiding, unshakable faith in the people. The ultimate trust in this state is not placed in government – no matter how well-informed, learned or wise those who govern may be. This is, as Mr. Lincoln would put it, government ultimately not only for the people but by the people. Subject to the overriding strictures of our federal Constitution, the people of this state – under the organic document that binds us together as an organized polity – fashion and frame the contents of the state Constitution, save for the extreme instance of a constitutional revision.

Proposition 8 is far removed from the forbidden boundaries that demark the territory of a revision to the state Constitution. Proposition 8 is simple. It addresses a single, non-structural question. It is straightforward. It was readily understandable by the people who went to the polls just weeks ago and voted – by the millions upon millions. Proposition 8 sought no transfer of governmental power. It effected no restructuring of our form of government, so as to strip the judiciary of its power. It brought about no shift of governmental authority from Sacramento or San Francisco to Washington, D.C. so as to rob our governmental structure – much less the state Constitution itself – of the overarching value of independence. Proposition 8 is quintessentially an amendment. Indeed, for this Court to rule otherwise would be to tear asunder a lavish body of jurisprudence built up over the decades of this Court's service to the people. That body of decisional law commands judges – as servants of the people – to bow to the will of those whom they serve – even if the substantive result of what the people have wrought in constitution-amending is deemed unenlightened or,

in the memorable words of Justice Mosk in the context of the people's restoration of the death penalty, "callous[]" and "macabre."

An extraordinary cloud of venerable judicial witnesses all speak with a single voice: Here, we the people govern, and judges and Justices – even of the state's highest Court – serve those to whom they are ultimately accountable. Any other result would signify a gravely destabilizing constitutional revolution. Stare decisis – and practical wisdom – counsel powerfully in favor of staying the constitutional course set by the many Justices who have gone before those now privileged to serve. Proposition 8 is a valid amendment adopted by the people. Under settled law and under first principles of governmental theory, Proposition 8 should stand.

ARGUMENT

I. PROPOSITION 8 IS A VALID INITIATIVE AMENDMENT AND NOT A REVISION OF THE CONSTITUTION.

A. Standard of Review – Proposition 8 is Valid Unless It Is "Clearly, Positively, and Unmistakably" a Revision.

From the outset, petitioners bear a heavy burden. Initiative measures enjoy a strong presumption of validity. The people, as ultimate sovereigns, have expressly reserved to themselves the power to amend the Constitution through the initiative process.[1] (Cal. Const., art. II, § 8, subd. (a); Cal. Const., art. IV, § 1; see also *Raven v. Deukmejian* (1990) 52 Cal.3d 336 (hereafter *Raven*).) As this Court taught in *Brosnahan v. Brown* (1982) 32 Cal.3d 236 (hereafter *Brosnahan*):

---

[1] Born out of deep concern about the power of special interests in state government, "[t]he amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's." (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, footnote omitted.) The 1911 amendment was "[d]rafted in light of the theory that all power of government ultimately resides in the people." (*Ibid.*)

> It follows from this [reservation] that the power of initiative must be *liberally* construed . . . to promote the democratic process. Indeed . . . it is our solemn duty jealously to guard the sovereign people's initiative power, it being one of the most precious rights of our democratic process. Consistent with prior precedent, *we are required to resolve any reasonable doubts in favor of the exercise of this precious right.*

(*Id.* at p. 241, citations and quotation marks omitted, italics in original.) "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." (*McFadden v. Jordan* (1948) 32 Cal.2d 330, 332 (hereafter *McFadden*).)

Consequently, "all presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501, citation omitted (hereafter *Eu*).) "Consistent with prior precedent, [this Court is] *required to resolve any reasonable doubts in favor of the exercise of [the] precious right [of initiative]*." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 248, italics in original (hereafter *Amador*).)

Further, the revision/amendment analysis is concrete in nature, focusing on the actual language of the challenged measure and its indisputable effect. "[This Court's] prior decisions have made it clear that" to prevail on a revision claim, "it must *necessarily or inevitably appear from the face of the challenged provision* that the measure" is a revision. (*Eu, supra,* 54 Cal.3d at p. 510, italics in original.) Arguments grounded in predictions of "grave, undesirable consequences to our government plan" fall short. (*Id.* at p. 512.) Where an initiative's "long-term consequences" or "future effects" are uncertain – where a revision claim is based on

forecasts that are "conjectural and speculative" (*id.* at p. 510) – this Court will reject the claim, "[r]esolving, as we must, all doubts in favor of the initiative process." (*Id.* at p. 511.)

Accordingly, Proposition 8 may be struck down only if plaintiffs can show there is no rational way to construe or understand the initiative as anything but a revision. If reasonable minds can differ – if petitioners' claims are not clearly and unmistakably correct – their challenge ineluctably fails.

B. The Distinction Between an Amendment and a Revision Turns on the Magnitude of the Measure's Effect on the Structure of the Constitution.

"Although '[t]he electors may amend the Constitution by initiative' (Cal. Const., art. XVIII, § 3), a 'revision' of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification (*id.*, §§ 2, 4), or by legislative submission of the measure to the voters (*id.*, §§ 1, 4)." (*Eu*, *supra*, 54 Cal.3d at p. 506.)

This Court's jurisprudence teaches that the pivotal distinction between amendments and revisions exists to ensure that broad changes in the structure of California's governmental system are proposed to the people through an elaborately deliberative procedure. The distinction does not turn on the judiciary's view of the wisdom of an amendment. Rather, "the revision provision is based on the principle that 'comprehensive changes' to the Constitution require more formality, discussion and deliberation than is available through the initiative process." (*Eu*, *supra*, 54 Cal.3d at p. 506, quoting *Raven*, *supra*, 52 Cal.3d at pp. 349-50.)

The revision vs. amendment analysis focuses on both the sheer number and the qualitative, substantive nature of the proposed changes to the basic constitutional structure:

> "Although the Constitution does not define the terms 'amendment' or 'revision,' the courts have developed some

> guidelines helpful in resolving the present issue. As explained [in prior cases], our revision/amendment analysis has a dual aspect, requiring us to examine both the quantitative and qualitative effects of the measure on our constitutional scheme. Substantial changes in either respect could amount to a revision."

(*Eu*, *supra*, 54 Cal.3d at p. 506, quoting *Raven*, *supra*, 52 Cal.3d at p. 350.) Amendments, by contrast, may make significant substantive changes to the Constitution, including fundamental rights, but do not affect the basic governmental framework. (*Livermore v. Waite* (1894) 102 Cal. 113, 118-19 (hereafter *Livermore*).)

This Court's long-settled jurisprudence is pellucidly clear that a quantitative revision is "an enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions." (*Amador*, *supra*, 22 Cal.3d at p. 222.) In contrast, "a qualitative revision includes one that involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its branches." (*Eu*, *supra*, 54 Cal.3d at p. 509.) Not only must the proposed measure alter governmental power or structure, it must accomplish "far reaching changes in the nature of [California's] basic governmental plan." (*Amador*, *supra*, at p. 223.)

C. This Court's Decisions Have Been Highly Deferential to the People's Initiative Power.

Only twice has this Court deemed proposed or enacted initiative amendments to be improper revisions. Both decisions were unanimous on that pivotal issue. In *McFadden v. Jordan* (1948) 32 Cal.2d 330, a proposed initiative amendment sought to add a new article to the Constitution that "consist[ed] of 12 separate sections (actually in the nature of separate articles) divided into some 208 subsections (actually in the nature of sections) set forth in more than 21,000 words." (*Id.* at p. 334.) In

comparison, the California Constitution at that time "contain[ed] 25 articles divided into some 347 sections expressed in approximately 55,000 words." (*Ibid.*) Quantitatively, the new measure was massive. Qualitatively, it would have effected sweeping changes to the existing constitutional framework:

> "[A]t least fifteen of the twenty-five articles contained in [the then-existing] Constitution would be either repealed in their entirety or substantially altered by the measure, a minimum of four [and possibly five] new topics would be treated, and the functions of both the legislative and the judicial branches of our state government would be substantially curtailed."

(*Id.* at p. 345.)

On a pre-election petition for writ of mandate, this Court barred the measure's submission to the voters. The reason: it was "clear beyond question" that the measure would constitute an unlawful revision. (*Id.* at p. 331.) The *McFadden* Court first stressed that the "right of initiative is precious to the people" and thus to be broadly construed, with all doubts resolved in favor of its use. (*Id.* at p. 332.) Nevertheless, the Court concluded that the proposed measure went much too far:

> The conclusion we have reached that the proposed measure is revisory rather than amendatory in nature and that as such it is barred from the initiative upon any legally permissible construction of the pertinent constitutional provisions is *overwhelmingly impelled by the far reaching and multifarious substance of the measure itself* and by the terms of the present constitutional provisions relative to the initiative and to amendment and revision of the Constitution

(*Ibid.*, italics added.)

The sole decision deeming an initiative amendment passed by the voters a revision is *Raven v. Deukmejian* (1990) 52 Cal.3d 336. Given its centrality to the issue at hand, we examine the decision in detail. *Raven* involved a challenge to Proposition 115, an initiative amendment entitled

the "Crime Victims Justice Reform Act." That sweeping measure sought to control past and future decisions of this Court across a wide spectrum of criminal law. It accomplished this ambitious goal by amending "section 24 of article I of the state Constitution, to provide that certain enumerated criminal law rights shall be construed consistently with the United States Constitution, and shall not be construed to afford greater rights to criminal or juvenile defendants than afforded by the federal Constitution." (*Raven, supra,* 52 Cal.3d at pp. 342-43.) Consisting of over 150 words, the provision expressly sought to eliminate this Court's foundational authority to decide the meaning of more than a dozen vital constitutional rights – all of which had been recognized for decades in California:

> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

(*Id.* at p. 350.)

The *Raven* Court began its revision analysis by examining the measure's quantitative effect. Despite the provision's vitiating so many important rights, this Court rejected a quantitative challenge, finding that "the quantitative effects on the Constitution seem no more extensive than those presented in prior cases upholding initiative measures challenged as

constitutional revisions." (*Raven, supra,* 52 Cal.3d at p. 352, citations omitted.)

The *Raven* Court held that the measure's fatal flaw was its *qualitative* effect on the fundamental nature of the Constitution's government plan: "In essence and practical effect, new article I, section 24, would vest all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court. From a qualitative standpoint, the effect of Proposition 115 is devastating." (*Raven*, *supra*, 52 Cal.3d at p. 352.) The Court found that, "[i]n effect, new article I, section 24, would substantially alter the substance and integrity of the state Constitution as a document of independent force and effect." (*Ibid.*) "Thus, Proposition 115 not only unduly restricts judicial power, but it does so in a way which severely limits the independent force and effect of the California Constitution." (*Id.* at p. 353.) By eliminating this Court's core authority to interpret independently California's Constitution, Proposition 115 "mandate[d] the state courts' blind obedience [to the United States Supreme Court], despite cogent reasons, independent state interests, or strong countervailing circumstances that might lead our courts to construe similar state constitutional language differently from the federal approach." (*Ibid.*) In sum:

> [T]he new provision vests a critical portion of state judicial power in the United States Supreme Court, certainly a fundamental change in our preexisting governmental plan.

(*Id.* at p. 355.)

Raven starkly contrasts with two important decisions upholding initiative amendments against revision-based challenges. In *In re Lance W.* (1985) 37 Cal.3d 873, 891, this Court upheld Proposition 8 (1982), an initiative amendment limiting the state exclusionary remedy for search and seizure violations. Several decisions of this Court had held – under the

California Constitution – that to secure basic rights, the state's exclusionary rule would extend beyond the protections afforded by the federal Constitution. Proposition 8 overturned those decisions by providing that "relevant evidence shall not be excluded in any criminal proceeding" except as required by the Fourth Amendment. (Cal. Const., art. I, § 27.)

Mounting a fundamental-rights and structurally-based challenge, the State Public Defender argued that Proposition 8 constituted a revision rather than an amendment "because it abrogates the judicial function of fashioning appropriate remedies for violation of constitutional rights." (*In re Lance W., supra,* 37 Cal.3d at p. 885.) This Court disagreed: "The restriction on judicial authority to fashion nonstatutory rules of evidence or procedure governing admission of unlawfully seized evidence does not, either qualitatively or quantitatively, accomplish such far reaching changes in the nature of judicial authority as to amount to a revision of the Constitution." (*Id.* at p. 891, internal quotation marks and brackets omitted.)

So too, in *People v. Frierson* (1979) 25 Cal.3d 142 (hereafter *Frierson*), this Court upheld an initiative amendment that directly abrogated the fundamental right – as defined and understood by this Court in *People v. Anderson* (1972) 6 Cal.3d 628 – to be free from state-imposed execution. Often overlooked is the fact that Proposition 17 not only overturned *Anderson* on the issue of cruel or unusual punishment but it also precluded a state constitutional challenge based on equal protection, due process, or any other constitutional provision.[2] Summarizing these holdings, this Court later explained:

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[2] The amendment provided:

> The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section

> Both *Lance W.* and *Frierson* concluded that no constitutional revision was involved because the isolated provisions at issue therein achieved no far reaching, fundamental changes in our governmental plan. But neither case involved a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution.

(Raven, supra, 52 Cal.3d at p. 355.)

The decisions in *McFadden*, *Raven*, *Lance W.*, and *Frierson* – as well as *Amador*, *Brosnahan*, and *Eu* – monolithically prescribe how manifestly disruptive an initiative amendment must be to the existing governmental structure ordained by the Constitution before it will be deemed a revision. Indeed, this Court has – for decades – construed initiatives proposing to change the Constitution as "amendments" rather than "revisions" – so much so that Justice Mosk once observed that "[o]ver the years to an almost universal extent, initiatives have been judicially untouchable." (Mosk, *Raven and Revision* (1991) 25 U.C. Davis L.Rev. 1.)[3]

> 6 *nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.*

(Cal. Const., art. I, § 27 (Italics added).)

[3]Justice Mosk's use of the word "untouchable" is no hyperbole. Since 1911, numerous initiative amendments have addressed weighty subjects affecting basic rights, yet none has met with a successful revision challenge. Proposition 10 (1914) involved the fundamental right to vote. (Cal. Const., art. XIII, § 12 (repealed 1946) [abolishing poll tax].) Proposition 5 (1934) cut back the fundamental right against self-incrimination by allowing a judge and counsel to adversely comment on a defendant's failure to testify. (Cal. Const., art. I, § 13 (repealed 1974); *id.*, art. VI, § 19 (repealed 1966).) Proposition 17 (1972) reinstated the death penalty and insulated it against *any* state constitutional attack. (Cal. Const., art. I, § 27.) Proposition 63 (1986) enshrined English as the "Official Language of California." (Cal. Const., art. III, § 6.) Proposition 209 (1996) prohibited public institutions from considering race, sex, or ethnicity "in the operation of public employment, public education, or public contracting," which opponents argued would end affirmative action and

D. Proposition 8 Is a Proper Initiative Amendment.

Proposition 8 readily passes muster under this Court's jurisprudence. Quantitatively, it is brief (14 words), simple, and narrow; it neither deletes nor alters the texts of other constitutional provisions. It does not address multiple subjects. Tellingly, *Raven*, *Brosnahan*, and *Amador* rejected quantitative challenges to much more extensive initiatives. As discussed above, the only decision to find a revision based on quantitative considerations was *McFadden*, where the proposed measure sought to add numerous sections and "more than 21,000 words" to the Constitution. (*McFadden*, *supra*, 32 Cal.2d at p. 334.) By comparison, Proposition 8's single section and 14 words are miniscule. Indeed, so much so that petitioners do not advance a quantitative revision argument.

Likewise, Proposition 8 does not fit any of this Court's descriptions of a qualitative revision. It does not "involve[] a change in the basic plan of California government, *i.e.*, a change in its fundamental structure or the foundational powers of its branches" (*Eu*, *supra*, 54 Cal.3d at p. 509), much less "far reaching changes in the nature of [California's] basic governmental plan." (*Amador*, *supra*, 22 Cal.3d at p. 223.) Nor does it clearly "affect either the structure or the foundational powers" of a branch of government or alter the "relationships between the three governmental branches, and their respective powers." (*Eu*, *supra*, 54 Cal.3d at p. 509.) By no stretch can it be argued that it "*necessarily or inevitably appear[s] from the face* of [Proposition 8] that the measure will substantially alter the basic governmental framework set forth in our Constitution." (*Id.* at p. 510, italics in original.) To the contrary, there has been no alteration whatever to that framework.

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harm women and minorities. (Cal. Const., art. I, § 31.) And Proposition 99 (2008) protected homeowners by limiting the power of eminent domain. (Cal. Const., art. I, § 19.)

Against this backdrop of over half-a-century of settled jurisprudence, petitioners advance two novel arguments. The first is that the principle of equal protection is so fundamental to the Constitution that a judicial holding requiring recognition of same-sex marriages cannot be overturned by an initiative amendment. (See Amended Petition for Extraordinary Relief, etc., of Petitioners Strauss et al., at pp. 23-35 (hereafter "Strauss Petn.").) The second is that restoring the traditional definition of marriage would fundamentally undermine the judiciary's role of protecting minority rights. (*Id.* at pp. 35-43.) These arguments are entirely without foundation in this Court's teachings. In 60 years of jurisprudence addressing revision-based challenges, no holding – or dicta – of this Court supports petitioners' challenge. To adopt petitioners' position would impermissibly truncate the people's bedrock power to amend the Constitution and to overturn judicial interpretations they deem unwise.

Before addressing petitioners' specific arguments, a preliminary point bears emphasis: Proposition 8 is about restoring and maintaining the traditional definition of marriage. It legally defines a word – "marriage" – so that it conforms to its deepest historical, cultural, and social roots. While the one-man/one-woman definition necessarily precludes same-sex marriage, it also precludes polygamous marriage. Petitioners' challenge depends on characterizing Proposition 8 as a radical departure from the fundamental principles of the California Constitution. They claim the people have singled out and targeted a vulnerable minority for denial of basic rights. But that portrayal is wildly wrong. Proposition 8 is limited in nature and effect. It does nothing more than restore the definition of marriage to what it was and always had been under California law before June 16, 2008 – and to what the people had repeatedly willed that it be throughout California's history. (See Facts (this brief), *supra*, pp. 1-3.) It in no manner impacts other legal benefits or rights enjoyed by gays and

lesbians under state law. It does not broadly seek to diminish or eliminate the constitutional or civil rights of gays and lesbians. Given the openness of Californians to all minority groups, petitioners' dark intimation that Proposition 8 could be a precursor to systematic oppression of homosexuals is extravagant. (Strauss Petn., pp. 26-27.)

1. The Initiative Power Includes the Power to Define the Scope of Equal Protection and Other Fundamental Rights.

Petitioners contend that "Proposition 8 would effectively eliminate the protections of the state equal protection clause for gay and lesbian people with regard to the fundamental right to marry." (Strauss Petn., p. 26.) This renders Proposition 8 an improper revision, they suggest, because equal protection is "an informing principle that permeates every facet of our constitutional system." (*Id.* at p. 23, internal citation and italics omitted.) In their view, so fundamental is equal protection to the Constitution that judicial decisions based on that principle are effectively beyond the initiative amendment power. (*Id.* at pp. 23 et seq.) Otherwise, petitioners pessimistically predict, minority rights would be subject to the tyranny of the majority, which the Constitution was designed to prevent. The argument fails.

a. For one, petitioners' argument has no support in this Court's jurisprudence. This Court has never suggested that the nature and scope of equal protection rights – or judicial interpretations of those rights – are somehow sacrosanctly exempt from the people's initiative-amendment power. Indeed, this Court has never suggested that *any* constitutional right is beyond that power. Nothing in *Raven*, *Brosnahan*, *Lance W.*, or *Frierson* – all dealing with constitutional rights – gives the slightest hint of any such limitation. Petitioners' theory thus contradicts this Court's long-settled approach to revision-based challenges, which focuses (as we have seen) on

whether the measure "is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution" by the sheer number of its deletions or additions, and whether it involves "far reaching changes in the nature of [California's] basic governmental plan." (*Amador*, *supra*, 22 Cal.3d at pp. 222-23.)

Contrary to petitioners' wishful thinking, this Court has repeatedly upheld initiative amendments limiting or outright eliminating important state constitutional rights without raising any serious question as to whether such rights are among the underlying principles alterable only by revision. (See, *supra*, footnote 3.) Consider two examples: In *In re Lance W.*, *supra*, 37 Cal.3d 873, this Court stated that "[t]he people could by amendment of the Constitution repeal section 13 of article I [protecting against unreasonable searches and seizures] in its entirety." (*Id.* at p. 892.) That is a formidable power indeed. Similarly, in *Frierson*, *supra*, 25 Cal.3d 142, this Court upheld the reinstatement of the death penalty despite this Court's earlier holding that capital punishment is cruel or unusual, *Anderson*, *supra*, 6 Cal.3d 628.[4] There can be little doubt that (1) the right to be free from unreasonable government searches and seizures and (2) the right to be free from cruel or unusual punishment are fundamental pillars of California's Constitution. Yet, *Lance W.* and *Frierson* specifically upheld the rights-stripping initiative amendments against revision-based challenges.

Frierson poses an even greater obstacle to petitioners' argument. Many who oppose the death penalty do so on equal protection grounds because (the argument runs) it is disproportionately imposed on racial minorities and the poor. (See, e.g., Fagan & Bakhshi, *New Frameworks for Racial Equality in the Criminal Law* (2007) 39 Colum. Hum. Rts. L. Rev.

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[4] Notably, the Court in *Anderson* had found "that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." (*Anderson*, *supra*, at p. 649.)

1, 19-20.) The people were unconvinced. Indeed, when passing Proposition 17, the people precluded any other state constitutional challenge to the death penalty, including those based on equal protection. (See Cal. Const., art. I, § 27.) Nonetheless, this Court brushed aside well-articulated concerns and upheld the amendment. If equal protection rights validly may be removed through the amendment process from a vulnerable class facing the death penalty, so too may the scope of equal protection rights be adjusted to limit marriage to its traditional, indeed nationally-recognized, definition. The Congress of the United States – and the President of the United States – embraced this traditional definition in 1996. (See 1 U.S.C. § 7; 28 U.S.C. § 1738C.)

b. At bottom, petitioners' entire argument is based on an over-reading of a few words in the nineteenth century case of *Livermore v. Waite* (1894) 102 Cal. 113. From this 114 year-old decision – which predates California's initiative revolution by more than fifteen years – petitioners attempt to tease out the notion that the current revision analysis includes a substantive inquiry into whether a measure affects a right that is simply too important to be amended. (Strauss Petn., pp. 21-22.) The argument is misguided. Briefly stated, *Livermore* involved a challenge to an amendment the Legislature proposed to the voters that would have changed the state capitol to San Jose. It is unclear whether the challenge claimed the amendment was an improper revision or just an improper amendment, but in any event the Court in lengthy dicta discussed the distinction between the two.[5] Petitioners conveniently quote one isolated piece of that discussion:

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[5] The Court's holding striking down the proposed amendment did not turn on it being a revision but on the Legislature not having the power to "propose for adoption by the people . . . a proposition which, if adopted, would by the very terms in which it is framed be inoperative." The Court held that "[t]he amendment proposed is neither a declaration by the people of a principle or of a fact, nor is it a limitation or a rule prescribed for the

> The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that *the underlying principles upon which it rests*, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.

(*Livermore*, *supra*, 102 Cal. at pp. 118-19, italics added.) From the italicized language, petitioners fashion their entire argument – that equal protection is a fundamental principle that can be altered only by revising the Constitution. (Strauss Petn., p. 19.) The argument badly misses the mark. The *Livermore* Court never specifically identified what such "underlying principles" might be. In any event a long, uninterrupted line of subsequent decisions have clarified that in the revision analysis the relevant principles are those that pertain to the basic plan of the government and not to particular individual rights.

Livermore also rests on a narrow reading of the *Legislature*'s power. The *Livermore* Court stressed that "[t]he power of the legislature to initiate any change in the existing organic law . . . being a *delegated power*, is to be *strictly construed* under the limitations by which it has been conferred." (*Livermore*, *supra*, 102 Cal. at pp. 118-19, italics added.) By contrast, the entire line of initiative revision vs. amendment cases rests on precisely the opposite principle – one founded in democratic theory:

> It is a fundamental precept of our law that . . . "the people *reserve* to themselves the powers of initiative and referendum." (Cal.Const., art. IV, § 1.) It follows from this

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guidance of either of the departments to which the sovereignty of the people has been intrusted." Rather, it is "is legislative in character, rather than constitutional," and thus improper to propose as a constitutional amendment. (*Livermore*, *supra*, 102 Cal. at 122.)

> that, "[t]he power of initiative must be *liberally construed* . . . to promote the democratic process."

(*Amador*, *supra*, 22 Cal.3d at p. 219, italics added, citations omitted.)

After the people's initiative power was inserted into the Constitution, the *McFadden* court restated its earlier formulation of the rule governing the revision/amendment analysis: "Consequently if the scope of the proposed initiative measure . . . is so broad that if such measure became law a substantial revision of our present state Constitution would be effected, then the measure may not properly be submitted to the electorate until and unless it is first agreed upon by a constitutional convention." (*McFadden*, *supra*, 32 Cal.2d at p. 334). Since *McFadden*, this Court has refined and repeatedly reiterated the basic analysis governing revision-based challenges and the broad deference owed to the people's reserved initiative power. Not once has it suggested or relied on an amorphous "underlying principles" inquiry unrelated to whether the challenged measure alters the basic structure of government.

This is not to deny that even "a relatively simple enactment" may constitute a revision. But to occur, the enactment's effect on the structure of government must be "far reaching." (*Amador*, *supra*, 22 Cal.3d at p. 223.) For example, even a simple "enactment which purported to vest all judicial power in the Legislature would amount to a revision." (*Ibid.*) Similarly, a measure "affect[ing] either the structure or the foundational powers" of a branch of government or altering the "relationships between the three governmental branches, and their respective powers," may constitute a revision. (*Eu*, *supra*, 54 Cal.3d at p. 509.) But Proposition 8 does nothing of the sort; instead, it simply reinstates the traditional definition of marriage without any impact on the foundational powers of government.

c. Petitioners' anti-majoritarian argument – that equality rights enjoy a special exemption from initiative amendments – ultimately proves too much. (Strauss Petn., pp. 36-37.) *All* constitutional rights are counter-majoritarian. Their entire purpose is to protect fundamental interests against majoritarian power. Eliminating a right – or reducing its substantive scope – necessarily renders someone more vulnerable to the power of the majority. But that has never been enough. Nothing in this Court's teachings suggests that whether Proposition 8 is a revision turns on whether it makes a particular group more or less vulnerable to majority will, or whether it affects minority rights. Under the California Constitution, that is a substantive public policy question that goes to the merits of the people's decision to adopt Proposition 8 – something not to be second-guessed in the revision/amendment analysis.

Moreover, petitioners' portrayal of the equal protection clause is undercut by the history of its adoption. The equal protection clause was not part of the Constitution of 1879. In fact, it was not adopted until 1974 – and then only by amendment, not revision.[6] Petitioners' argument thus rests on the bald assertion that a relatively recent (albeit important) amendment can be altered only by a revision. This Court's jurisprudence lends no support to that assertion. In any event, Proposition 8 does not in

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[6] The equal protection clause was added to the Constitution by amendment in 1974 by Proposition 7. The Legislature's resolution that proposed Proposition 7 stated: "Resolved by the Assembly, and Senate concurring, That the Legislature . . . hereby proposes to the people of the State of California that the Constitution of the state *be amended* as follows: . . . " (Assem. Const. Amend. No. 60, Stats. 1974 (1973-1974 Reg. Sess.) res. ch. 90, pp. 3736-3737, italics added; see also Interveners' RJN at Exh. 8.) In the voters pamphlet, the text of Proposition 7 stated: "This *amendment* . . . expressly *amends* existing sections of the Constitution by *amending* and repealing various sections thereof and adding sections thereto." (Voters Pamphlet, Gen. Elec. (Nov. 5, 1974) Text of Proposed Law of Prop. 7, p. 27, italics added; see also Interveners' RJN at Exh. 9.)

any manner seek to repeal the equal protection clause. On the contrary, it merely modifies one dimension of its application, as established by a path-breaking ruling of this Court and to a particular set of facts. That is exactly what constitutional amendments are for.

Petitioners' speculation that Proposition 8 "opens the door to step-by-step elimination of state constitutional protections for lesbian and gay Californians and, indeed, for other disfavored minorities" is both theoretical in the extreme and improperly dismissive of the considered judgment and good will of the people of this state. (Strauss Petn., p. 27.) The scope of Proposition 8 could not have been narrower and still accomplish the limited objective of restoring the traditional definition of marriage. Proposition 8 leaves undisturbed all other rights affecting gays and lesbians. They continue to enjoy all rights of free speech, religion, assembly, privacy, due process, property, and so forth. The equal protection clause continues fully to protect gays and lesbians in literally all areas of the law, with the sole caveat that the definition of marriage is limited. What is more, gays and lesbians continue to enjoy a robust array of other statutory rights and protections. To the extent that Proposition 8 limits the rights of same-sex couples, it does so only as a necessary incident to the people's sovereign decision to restore the traditional definition of marriage – one that is embraced across the nation and, indeed, across cultural and geographical boundaries.

d. Petitioners repeatedly describe the right of same-sex couples to marry as fundamental, with language suggesting it has long existed and is now deeply woven into the fabric of our Constitution. That is not so. It was, of course, not even a recognized right prior to this Court's 2008 decision in the *Marriage Cases*. Indeed, it seems unlikely that petitioners would have seriously considered a revision-based challenge to Proposition 8 had it been enacted in the years before the *Marriage Cases*.

It is even less likely that such a challenge would have had any possibility of success.

2. Proposition 8 Does Not Revise the Constitution by Altering the Judiciary's Fundamental Role in the Constitutional Plan.

Proposition 8 does nothing to alter the role of the judiciary in California's constitutional plan. *Raven* is the critical case bearing on this issue. But unlike *Raven*, where the independence of both the California judiciary and the state Constitution itself were at stake, Proposition 8 leaves the judiciary fully empowered to perform its constitutional function – to say what the applicable law is. (*See Marbury v. Madison* (1803) 1 Cranch 137, 178 (hereafter *Marbury*); see also this brief, Part II, *infra*.) In contrast with *Raven*, after Proposition 8 this Court will continue to be the final arbiter of the meaning of all provisions in the California Constitution, including the equal protection clause. Neither the Legislature nor the Executive has been aggrandized at the judiciary's expense. Nor have any of the judiciary's functions been eliminated or transferred.

Petitioners claim Proposition 8 changes the judiciary's fundamental role because it precludes same-sex marriage – or, in petitioners' formulation, because it prevents the judiciary from enforcing equal protection rights with respect to the fundamental right to marriage. According to petitioners, this would fundamentally undermine the role of the judiciary in protecting minority and equality rights. (Strauss Petn., p. 29.)

This argument profoundly misconstrues the nature of the judiciary in a constitutional republic. As explained more fully under the second question, the judiciary's role in protecting equality and minority rights derives exclusively from its role in interpreting and applying the law. That role does not spring from an extra-constitutional mandate to achieve a particular substantive result with respect to equality or any other

substantive norm. This Court has never had a roving commission or substantive role apart from the specific provisions of the California Constitution and the state's statutory law.

Proposition 8 changes the law that the judiciary must interpret, but it does not alter in the slightest the function of the judiciary. It simply inserts into the Constitution the traditional definition of marriage. The fact that Proposition 8 affects the reach of other rights in the Constitution – including the equal protection clause – does not revise the judiciary's constitutional role to say what the law is – much less to assign its role to another branch of government.

Therefore, petitioners err in suggesting that Proposition 8 "entirely strip[s] the courts of authority to enforce the guarantee of equal protection" in a way that "fundamentally alters the separation of powers contemplated by our existing constitutional scheme." (Strauss Petn., p. 41.) To the contrary, in the wake of Proposition 8, the courts remain fully empowered to enforce "the guarantee of equal protection." That Proposition 8 alters the Constitution (so that equal protection no longer requires same-sex marriage) does not suggest that the judiciary's fundamental role in interpreting the law has been changed. The thing that has changed is the applicable law. Contrary to the core assumption embedded in petitioners' argument, the judiciary does not have a vested interest in a particular outcome nor a decision making role that exists apart from the terms of the Constitution itself. The Constitution has now been changed by the sovereign act of the ultimate authority, the people.

For these same reasons, the Massachusetts Supreme Judicial Court rejected a very similar argument. Massachusetts excludes from the initiative process "measure[s] that relate[] to . . . the powers . . . of courts." (Mass. Const., Art. 48, The Referendum, Part III, § 2.) In *Albano v. Att'y Gen.* (Mass. 2002) 769 N.E. 2d 1242, the Commonwealth's highest court

stated that "a petition is not excluded under art. 48 merely because it changes the law enforced by the courts. *To adopt such an interpretation would be to render the popular initiative virtually useless*." (*Id.* at p. 1245, italics added.) Laws that relate to the powers of the courts are those that "alter[] the courts' basic ability to render decisions in an entire category of cases . . . . By contrast, when an initiative petition only alters the substantive law enforced by the courts, the work of the courts is affected in an incidental way; it cannot be said that the 'main feature' of that petition is to alter the power of the courts." (*Id.* at pp. 1245-46.)

E. The Courts of Other States Have Uniformly Rejected Similar Revision Challenges.

Decisions from other state courts strongly support Interveners' position. Courts in Oregon and Alaska have specifically rejected revision-based challenges to marriage amendments. In *Lowe v. Keisling* (Or. App. 1994) 882 P.2d 91, the plaintiffs sought to prevent voting on a ballot measure that would have denied "minority status" based on sexual orientation, restricted public education regarding homosexuality, and prohibited the government from granting "marital status or spousal benefits on the basis of homosexuality." (*Id.* at p. 93.) The plaintiffs, like petitioners here, argued that the ballot measure amounted to a revision because it "propose[d] far reaching changes . . . including profound impacts on existing fundamental rights and radical restructuring of the government's relationship with a defined group of citizens." (*Id.* at p. 96.) They also contended, like petitioners here, that the initiative "will refashion the most basic principles of [state] constitutional law." (*Id.* at pp. 96-97.) The Oregon court readily acknowledged that the proposed measure "may affect a number of constitutional provisions," but nevertheless held that the measure "would not result in the kind of fundamental change in the constitution that would constitute a revision." (*Id.* at pp. 97-98.)

More recently, the court in *Martinez v. Kulongoski* (Or. App. 2008) 185 P.3d 498, rejected a revision-based challenge to the Oregon Marriage Amendment, which stated, much like Proposition 8, that "only a marriage between one man and one woman shall be valid or legally recognized as a marriage." (Or. Const., art. XV, § 5a.) The *Martinez* plaintiffs, like the *Lowe* plaintiffs and petitioners here, argued that the amendment constituted a revision because of the "profound impacts on existing fundamental rights and radical restructuring of the government's relationship with a defined group of citizens." (*Martinez*, *supra,* 185 P.3d at p. 505 quoting *Lowe*, *supra,* 882 P.2d at p. 96].) Rejecting plaintiffs' contentions, the *Martinez* court held that the Oregon Marriage Amendment did not amount to a constitutional revision.

In *Bess v. Ulmer* (Alaska 1999) 985 P.2d 979, the Alaska Supreme Court likewise concluded that the Alaska Marriage Amendment, which states that "a marriage may exist only between one man and one woman," did not constitute a revision. Importantly, the court began its analysis by looking for guidance to California's revision/amendment jurisprudence. (*Id.* at pp. 984-87.) The *Bess* court applied this Court's "hybrid analysis" to address the proposed ballot measure. (*Id.* at p. 988.) The court found that only a "[f]ew sections of the Constitution [were] directly affected" by the amendment and, based upon this Court's precedent, reasoned that "nothing in the proposal [would] 'necessarily or inevitably alter the basic governmental framework' of the Constitution." (*Ibid.*, quoting *Brosnahan*, *supra*, 32 Cal.3d at p. 262.) The court thus concluded that the Alaska Marriage Amendment was "sufficiently limited in both quantity and effect of change as to be a proper subject for a constitutional amendment." (*Id.* at p. 988.)

As already discussed, in *Albano v. Att'y Gen.* (Mass. 2002) 769 N.E. 2d 1242, Massachusetts' high court rejected a closely analogous challenge

to a proposed (but never enacted) marriage amendment stating that "only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts." That same court later affirmed that a constitutional amendment is the proper vehicle for changing court-approved constitutional law allowing same-sex marriage. (*Schulman v. Att'y Gen.* (Mass. 2006) 850 N.E.2d 505, 510-11.)

These holdings are fully consistent with other court decisions distinguishing revisions from amendments. Much as in California, a long line of cases in numerous state courts holds that a revision occurs only when the challenged measure effects significant changes to the governmental structure or powers.[7]

F. Petitioners' Novel Arguments Would Dramatically Abridge the People's Right to Amend the Constitution by Initiative.

Every relevant decision of this Court has affirmed that the right of the people to amend the Constitution by initiative must be construed broadly and guarded zealously. It cannot be repeated too often that this

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[7] See, e.g., *Adams v. Gunter* (Fla. 1970) 238 So.2d 824, 829-31 [finding a revision where proposed initiative amendment would alter numerous provisions of the Florida Constitution and change the legislature to a unicameral body; such a "cataclysmic change" could be appropriately raised by the people only at a convention convened to consider a revision]; *Smathers v. Smith* (Fla. 1976) 338 So.2d 825, 826-29 ["The function of a section amendment is to alter, modify or change the substance of a single section of the Constitution containing particularized statements of organic law. . . . *The function of an article revision is to restructure an entire class of governmental powers or rights.*" (Italics added)]; *Citizens Protecting Michigan's Constitution v. Secretary of State* (Mich. 2008) 755 N.W.2d 157, 158 [proposed initiative amendment invalid where it would "alter or affect some 19,000 words of the Michigan Constitution, and would alter or affect some 28 sections of this constitution, including four separate articles, thus affecting each of the branches of state government"]; *Holmes v. Appling* (Or. 1964) 392 P.2d 636, 639-40 [finding revision where proposed amendment was fifty-six pages long and would essentially replace the current constitution with a new one].

"right" is actually a reserved power, and that when the people employ it, they act in their sovereign capacity. Only when the use of that power has clearly and unmistakably exceeded the boundaries the people themselves have set can the judiciary properly intervene.

That is plainly not the case here. Of all the challenged initiatives in the case law, Proposition 8 is likely the narrowest and least disruptive. Substantively, the constitutional world after Proposition 8 has simply returned exactly to what it was only a few months ago and where it had always been.

This case is about far more than the passionate debate over the definition of marriage. It is about whether the democratic conversation with respect to numerous issues can continue to occur through the official channels ordained by the California Constitution and relied upon for generations by the people. These are weighty matters that transcend the marriage issue. They touch profoundly on fundamental principles of popular sovereignty and democratic legitimacy.

G. The United States Constitution Continues to Protect the Fundamental Rights of All Californians.

With the people's power to change the Constitution by initiative come both the advantages and risks inherent in direct democracy. But petitioners' tactic of invoking various doomsday possibilities does not advance their cause. The people have the power to enact initiative amendments that are condemned by some as foolish, oppressive, or simply bad policy. The reason is this: the initiative power is broadly construed and limited only by the requirement that it not quantitatively or qualitatively alter the basic structure of government.

That said, a vital safety net remains. Despite its breadth, the people's initiative power remains subject to the higher authority of the United States Constitution, which guarantees the fundamental rights of all

Americans. Thus, the complete answer to petitioners' parade of horribles is that the federal Constitution remains a bulwark against the tyranny of the majority.[8]

II. AS A PROPER INITIATIVE AMENDMENT, PROPOSITION 8 DOES NOT VIOLATE THE SEPARATION OF POWERS.

As already discussed, separation of powers concerns are integral to the revision/amendment analysis. However, once a measure is found to be a proper amendment rather than a revision, no additional separation of powers inquiry remains. This Court has never suggested that the judiciary has an independent role or existence beyond that established by the Constitution, whose structure gives it birth in the first instance. Therefore, if the answer to the first question is that Proposition 8 is an amendment rather than an improper revision, then the Constitution has been validly changed and the inquiry is at an end. Accordingly, this section of the brief is an extended discussion of principles relevant to the separation of powers inquiry under the revision/amendment analysis.

A. The Doctrine of Separation of Powers.

The separation of powers doctrine begins with the recognition that in California "[a]ll political power is inherent in the people." (Cal. Const., art. II, § 1.) Thus, "all governmental power, legislative or otherwise, is derived from the people." (*Dye v. Council of City of Compton* (1947) 80

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[8] Petitioners argue that Proposition 8 excludes them from full participation in the "ordinary civil life in a free society." *Romer v. Evans* (1996) 517 U.S. 620, 631 (Strauss Petn., p. 34.) In advancing this argument, they conflate and confuse the state constitutional revision question, which is directly at issue here, with federal constitutional questions which are not. Of course, petitioners are free to bring a federal constitutional challenge. But they have chosen not to raise such a challenge in this case, and this Court should exercise great care not to allow the separate federal analysis to muddy this Court's clear jurisprudence on what constitutes a revision under the state Constitution.

Cal.App.2d 486, 489-90.) Through the Constitution, the people established the three branches of government and delegated to those branches their respective powers. (Cal. Const., art III, § 3.) Shortly after California became a state, this Court stated:

> [The] powers of the State reside primarily in the people; and they, by our Constitution, have delegated all their own powers to the three departments – legislative, executive, and judicial – except in those cases where they have themselves exercised these powers, or ... reserved the same to themselves.

(*Nougues v. Douglass* (1857) 7 Cal. 65, 69.)

Separation of powers is a fundamental constitutional principle, not merely a judicial doctrine. The Constitution states: "Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art III, § 3.) In *In re Rosenkrantz* (2002) 29 Cal.4th 616, this Court explained the purpose and effect of this constitutional provision:

> The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the *core functions* of another branch. Although article III, section 3 of the California Constitution defines a system of government in which the powers of the three branches are to be kept largely separate, it also comprehends the existence of common boundaries between the legislative, judicial, and executive zones of power thus created. Its mandate is to protect any one branch against the overreaching of any other branch. The separation of powers principle does not command a hermetic sealing off of the three branches of Government from one another. The doctrine . . . recognizes that the three branches of government are interdependent, and it permits actions of one branch that may significantly affect those of another branch.

(*Id.* at p. 662, internal quotation marks, brackets and citations omitted, and italics added.) In sum, "[t]he purpose of the doctrine is to prevent one branch of government from exercising the complete power constitutionally

vested in another." (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 298.)

B. The Primary Constitutional Role of the Judiciary Is to Expound the Law.

"The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Cal. Const., Art. VI, § 1.) As Justice Mosk succinctly stated, the core function of the judiciary "is to expound the law, not to make it." (*Kopp v. Fair Political Practices Comm'n* (1995) 11 Cal.4th 607, 673 (conc. opn. of Mosk, J.).) The iconic formulation of this basic understanding of the judicial function was fashioned by Chief Justice Marshall in *Marbury v. Madison*, *supra*, 1 Cranch at p. 178: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule."

When the Great Chief Justice wrote about the power of judicial review in *Marbury*, his focus was on enforcing the United States Constitution as the supreme will of the people. As explained by Professor Alexander Bickel in his seminal work, *The Least Dangerous Branch*, Chief Justice Marshall followed Alexander Hamilton in grounding the role of the judiciary in carrying out the will of the lawmaker – most importantly the will of the sovereign people:

> Marshall himself followed Hamilton, who in the 78th *Federalist* denied that judicial review implied a superiority of the judicial over the legislative power .... "It only supposes," Hamilton went on, "that the power of the people is superior to both; and that where the will of the legislature, declared in statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."

(Bickel, *The Least Dangerous Branch* (1962), p. 16.) Indeed, as Chief Justice Marshall would later write, the judiciary has no independent will of its own. Its role is solely to carry out the will embedded in the law:

> Th[e] [judicial] department has no will, in any case.... Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing.... Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

(*Osborn v. Bank of U.S.* (1824) 22 U.S. 738, 866 (Marshall, C.J.).)

In like manner, this Court has long expounded this foundational understanding when describing the role of the California judiciary:

> *[O]ur distinctive service is one of inquiry rather than of judgment, and in the conduct of that inquiry we can do no more than interrogate the Constitution itself and report its responses when we shall have ascertained them.* Though the judiciary, like other departments of the Government, is bound to use its powers so as best to promote the public good and fulfil [sic] the will of the people, still *we can know nothing of that will, except as it has found expression in the Constitution*; nor can we, under pretext of promoting the public welfare, usurp powers with which the people have never invested us. [¶] The great object, with reference to which all the rules and maxims that govern the interpretation of statutes, Constitution, and other written instruments have been framed, is to discern the true intent of their authors, and when that intent has been ascertained, it becomes the duty of the Court to give effect to it, whatever may be the convictions of the Judges as to its wisdom, expediency or policy.

(*Bourland v. Hildreth* (1864) 26 Cal. 161, 180, italics added.)

This classic formulation remains vibrantly relevant to this day. Indeed, this Court has more recently stated that it "has often recognized" that "the judicial role in a democratic society is fundamentally to interpret laws, not to write them." (*California Teachers Assn. v. Governing Bd. of Rialto Unified Sch. Dist.* (1997) 14 Cal.4th 627, 633, internal brackets,

quotation marks and citations omitted.) The substantive wisdom of a law is therefore irrelevant to the judicial function, inasmuch as its vital but limited role is to carry out the law as it receives it. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1042-43 ["By enacting Proposition 35, the electorate has exercised its authority. Our role as a reviewing court is to simply ascertain and give effect to the electorate's intent .... We do not, of course, pass upon the wisdom, expediency, or policy of enactments by the voters any more than we would enactments of the Legislature."].) "[S]eparation of powers principles compel courts to effectuate the purpose of enactments [and] ... no inquiry into the 'wisdom' of underlying policy choices is made." (*People v. Bunn* (2002) 27 Cal.4th 1, 16-17.)

In addition to expounding the law in the context of resolving specific controversies between parties, the judiciary has several other important functions:

> It is also a core judicial function to ensure the orderly and effective administration of justice. The courts have the inherent power, *derived from the Constitution*, to ensure the orderly administration of justice; this power is not confined by or dependent on statute. One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers and jurisdiction by constitutional provisions, has been the right to control its order of business and to so conduct the same that the rights of all suitors before them may be safeguarded. This power has been recognized as judicial in its nature, and as being a necessary appendage to a court organized to enforce rights and redress wrongs.

(*Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172, 184-185, citations and quotation marks omitted, italics added.)

Notably absent from any of these descriptions is the notion that the judiciary has any role independent of the law. Contrary to the anti-democratic implication of petitioners' argument, the judiciary does not have

a stand-alone mandate to protect minority rights or ensure equality apart from the law. When the judiciary protects minority rights from ordinary statutes or government acts, it does so under the people's delegated authority set forth in the higher law of the Constitution. No other source of power exists. "[T]here is no inalienable right or natural law which might arguably be above the California Constitution." (*Nougues v. Douglass*, *supra*, 7 Cal. at p. 69.)

C. Proposition 8 Does Not Alter the Separation of Powers.

Proposition 8 does nothing to change the constitutional powers of the several branches of government. It in no way deprives the judiciary of its role as the final and ultimate (government) expositor of what the Constitution means. It simply makes a substantive change in the Constitution, which the judiciary is now free to interpret as it would any other constitutional provision.

In truth, it is petitioners' arguments that would alter the separation of powers. Any decision that in effect constitutes the judiciary as an independent actor -- apart from the Constitution and the laws – in defining and protecting rights and equality would sever the judiciary from its constitutional moorings.

III. SAME-SEX MARRIAGES PERFORMED AFTER THIS COURT'S DECISION IN THE *MARRIAGE CASES* BUT BEFORE PROPOSITION 8 ARE NO LONGER VALID OR RECOGNIZED UNDER CALIFORNIA LAW.

Between June 16 and November 5, 2008, many marriages for same-sex couples were performed in California (hereafter "interim marriages"). For purposes of this Court's consideration, the issue is not whether these marriages were validly performed or whether they should have received recognition before Proposition 8 was passed. Rather, as this Court's third

question identifies, the crucial question is what effect Proposition 8 has on these interim marriages going forward.

A. Same-Sex Marriages Are No Longer Valid or Recognized in California.

At the outset, a preliminary point is crucial: "The state has a vital interest in the institution of marriage and plenary power to fix the conditions under which the marital status may be created or terminated." (*Estate of DePasse* (2002) 97 Cal.App.4th 92, 99.) The United States Supreme Court has recognized that the "[r]egulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states." (*Sosna v. Iowa* (1975) 419 U.S. 393, 404; *Maynard v. Hill* (1888) 125 U.S. 190.) Subject to state constitutional limitations, "the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated, as well as the effect of an attempted creation of that status." (*McClure v. Laura Alpha Donovan* (1949) 33 Cal.2d 717, 728; see also *Lockyer*, *supra*, 33 Cal.4th. at 1074.) Hence, a person's interest in the status of marriage, "however it be classified, [is] subject to the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy." (*In re Marriage of Walton* (1972) 28 Cal.App.3d 108, 113.)

With the passage of Proposition 8, the people of California have placed the traditional definition of marriage – and a rule of non-recognition for all other marriages – in the Constitution, thus definitively deciding the status of marriage under California law. (*Olson v. Cory* (1982) 134 Cal.App.3d 85, 101 [constitutional amendment definitively decides constitutionality of challenged provision under state Constitution].) Proposition 8 is now the fundamental public policy of this state.

1. The Text of Proposition 8 Is Clear -- Same-Sex Marriages Are Not Currently Valid or Recognized in California.

When interpreting an initiative amendment, the role of a reviewing court "is to simply ascertain and give effect to the electorate's intent" and not to "pass upon the wisdom, expediency, or policy of enactments by the voters any more than we would enactments of the Legislature." (*Professional Engineers in California Government v. Kempton, supra,* 40 Cal.4th at pp. 1042-43.) The court must "determine and effectuate the intent of those who enacted the constitutional provision at issue.... [T]heir intent governs." (*Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 212.) The clearest indication of intent is the language of the measure itself. (*Regents of University of California v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 607.)

Proposition 8's brevity is matched by its clarity. There are no conditional clauses, exceptions, exemptions, or exclusions: "Only marriage between a man and a woman is valid or recognized in California." Proposition 8 establishes what marriages are valid and recognized in California. Its plain language encompasses both pre-existing and later-created same-sex (and polygamous) marriages, whether performed in California or elsewhere. With crystal clarity, it declares that they are not valid or recognized in California.

Proposition 8's effect on foreign same-sex marriages provides a useful key for analyzing its effect on interim marriages. If a same-sex couple in Massachusetts married in July 2008 and moved to California in December 2008, under the plain language of Proposition 8 their marriage would not be valid or recognized in California. That is *not* to say their marriage is void, or that the couple was not legally married in Massachusetts, or that the couple would not be legally married in a

jurisdiction that recognizes same-sex marriages. It is only to say that their marriage is not currently valid or recognized in California. The same is true of a same-sex couple married in California in July 2008.[9] Nothing in the language of Proposition 8 permits different treatment of these marriages. Indeed, this Court has already authoritatively construed the identical language in Proposition 8, holding that it did not "draw any distinction between in-state and out-of-state marriages" and concluding "more broadly that only marriage between a man and a woman is valid in California." (*Marriage Cases*, *supra*, 43 Cal.4th at 797 (italics omitted).) To now construe that language otherwise would directly undermine the fundamental public policy established by Proposition 8 and the state's authority not to recognize marriages that violate that policy.

2. Other Indicia of the Voters' Intent Confirm the Plain Language of Proposition 8.

"When the language [of an initiative] is ambiguous, [courts] refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 23.) As shown above, the language of Proposition 8 is not ambiguous. (See also *id.* at p. 25 [finding that Proposition 22 is unambiguous].) Nevertheless, other indicia confirm the voters' intent that Proposition 8 would have the effect of its plain language. These indicia include the ballot pamphlet, the context of the initiative, the object in view, the concern at issue, the history of legislation upon the same subject, public policy, and contemporaneous construction. (*In re Marriage of Petropoulos* (2001) 91 Cal. App. 4th 161, 171.)

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[9] The Supreme Court of Oregon focused on this principle when it recognized that the state is the "locus of power over marriage-related matters" and thus "if that power is broad enough to preempt other states' contrary marriage policies, it inescapably is broad enough to preempt similar policies" from within the state. (*Li v. State* (Or. 2005) 110 P.3d 91, 99.)

Proposition 8 was not a change in course, but rather a successful effort to place long-standing public policy in the Constitution. "California statutes always have limited and continue to limit marriage to opposite-sex couples." (*Marriage Cases, supra,* 43 Cal. 4th at p. 801.) "From the beginning of California statehood, the legal institution of civil marriage has been understood to refer to a relationship between a man and a woman." (*Id.* at p. 792.) Various laws and court decisions enshrined that understanding. (*Ibid.*) In March 2000, in response to decisions by courts in other states, the people passed Proposition 22 (enacted as Fam. Code, § 308.5), a statutory initiative with language identical to Proposition 8, to again reaffirm the established definition of marriage.

Proposition 22 faced two attacks. First, some argued that it applied only to out-of-state same-sex marriages, a position this Court later rejected. (*Marriage Cases*, *supra*, 43 Cal.4th at p. 799.) Second, in 2004, multiple lawsuits were filed claiming it was unconstitutional. As those lawsuits progressed, the process of amending the Constitution began in earnest. (See Facts (this brief), *supra*, pp. 1-3.) Proposition 8 was therefore a successful attempt to constitutionalize Proposition 22.

This legislative history reveals the voters' unambiguous intent to enshrine the traditional definition of marriage in the Constitution itself . The language, policy, history, and intent of Proposition 8 do not permit recognition of some same-sex marriages but not others. None are valid or recognized in California.

This is confirmed by other indicia of the electorate's understanding and intent. The Official Title and Summary prepared by the Attorney General explained that Proposition 8 does two things: [1] "Changes the California Constitution to eliminate the right of same-sex couples to marry in California," and [2] "Provides that only marriage between a man and a woman is valid or recognized in California." (Voter Information Guide,

Gen. Elec. (Nov. 4, 2008) official title and summary of Prop. 8, p. 54; Interveners' RJN at Exh. 4.) If Proposition 8 was intended only to prevent new same-sex couples from getting married, the first statement would have been sufficient.

The ballot argument in favor of Proposition 8 is even more explicit: "Proposition 8 means that only marriage between a man and a woman will be valid or recognized in California, *regardless of when or where performed*." (Voter Information Guide, Gen. Elec. (Nov. 4, 2008) Rebuttal to Argument Against Prop. 8, p. 57, italics added; see Interveners' RJN at Exh. 6.) Thus, the "object in view" of Proposition 8 was to put the traditional definition of marriage in the Constitution to "ensure that California will not legitimize or recognize same-sex marriages from other jurisdictions and that California will not permit same-sex partners to validly marry within the state." (*Marriage Cases, supra,* 43 Cal.4th at p. 799, internal quotation marks and ellipsis omitted; italics omitted.) The concern at issue was the possibility that existing laws limiting marriage to opposite-sex couples would be held unconstitutional. After that occurred, the concern became to make clear that the California Constitution did not require recognition of same-sex marriages, as had been held in the *Marriage Cases*. Hence, the ballot arguments say that Proposition 8 "restores" the definition of marriage to what the voters had approved and "overturns" the decision of this Court. (Voter Information Guide, Gen. Elec. (Nov. 4, 2008) argument in favor of Prop. 8, p. 56; see Interveners' RJN at Exh. 6.) Moreover, "the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction" all support the plain meaning of Proposition 8. (*In re Marriage of Petropoulos, supra,* 91 Cal.App.4th at p. 171.)

In sum, regardless of whether Proposition 8 voids interim marriages *ab initio*, there is no support for the notion that interim marriages are now

valid or recognized under California law. There is only one definition of marriage in California, and it recognizes only the union of a man and a woman. This Court's ruling in this matter should make that clear. (*Lockyer*, *supra,* 33 Cal.4th at p. 1117.)

B. Specific Issues Involving Interim Marriages Should Be Resolved As They Arise.

To be sure, questions will arise about the status of legal rights and duties created by interim marriages. Interveners can readily identify two alternative paths – consistent with fundamental separation of powers principles – for this Court to consider in determining how best to deal with these issues.

First, this Court could determine that it is optimal to evaluate the remaining substantive rights, benefits, and obligations of same-sex couples who married prior to Proposition 8 on an individual, case-by-cases basis. Circumstances will differ in each of the cases. What may be fair and just in one case may be unfair and unjust in another. It may therefore be prudent to deal with serious questions about rights, duties, and benefits the way the legal process normally deals with such matters – with a specific case and controversy. There can be little doubt that the judicial branch has numerous legal tools and equitable remedies to address these issues. Indeed, courts have long dealt with putative marriages and other unions of uncertain validity. (See, e.g., *Vallera v. Vallera* (1943) 21 Cal.2d 681, 683-684.) So it is that this Court has already expressed its willingness in general terms to proceed along this path. After refusing to recognize marriages performed by certain municipalities contrary to California law, this Court stated that "there can be no question that the legal status of such couples ... will continue to generate numerous questions for such couples and third parties that must be resolved on an ongoing basis." (*Lockyer*, *supra,* 33 Cal.4th at p. 1117, fn. 40.)

Second, this Court could determine that it is best to leave these issues to the Legislature for resolution. In many respects, the Legislature may be better suited institutionally to address the problems and issues. (See *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1139 [noting Legislature's unique ability to study "various policy and factual questions"].) In a parallel situation, the Vermont Supreme Court left it to the state legislature to craft a remedy consistent with the Vermont Constitution. (*Baker v. State* (Vt. 1999) 744 A.2d 864, 886.)

Whatever course this Court chooses or whatever path the Legislature might take, Proposition 8 makes one thing very clear: Same-sex marriages are no longer "valid" or "recognized" in California.

CONCLUSION

For all the foregoing reasons, this Court should hold (1) that Proposition 8 is a valid initiative amendment, not a revision, (2) that Proposition 8 does not violate the separation of powers doctrine, and (3) that no marriage other than one between a man and a woman, regardless of when or where performed, is valid or recognized in California.

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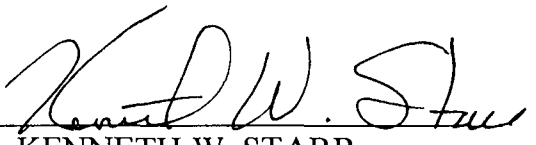
Dated: December 18, 2008

Respectfully submitted,

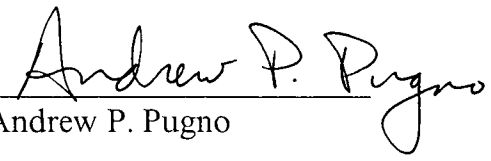
KENNETH W. STARR, State Bar No. 58382
24569 Via De Casa
Malibu, CA 90265-3205
Telephone: (310) 506-4621
Facsimile: (310) 506-4266

ANDREW P. PUGNO, State Bar No. 206587
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Dr Ste 100
Folsom, CA 95630-4726
Telephone: (916) 608-3065
Facsimile: (916) 608-3066

By: 
KENNETH W. STARR
Attorneys for Interveners

RULE 8.204(C)(1) CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for Interveners hereby certifies that this Interveners' Opposition Brief is proportionately spaced, has a typeface of 13 points or more, and contains 12,917 words, including footnotes but excluding the Table of Contents, Table of Authorities and Certificate of Compliance, as calculated by using the word count feature in Microsoft Word.



Andrew P. Pugno

Attorney for Interveners

PROOF OF SERVICE

I, Andrew P. Pugno, declare: I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 101 Parkshore Drive, Suite 100, Folsom, CA 95630.

On December 19, 2008, I served the following document(s):

1. INTERVENERS' OPPOSITION BRIEF

on the interested parties in this action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

and served the document(s) in the manner indicated below:

☒ BY OVERNIGHT MAIL SERVICE: by placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill addressed as set forth in the Service List, and causing the envelope to be delivered to an overnight mail service for delivery.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct. Executed on December 19,2008, at Folsom, California.

Andrew P. Pugno

ANDREW P. PUGNO

Service List

For Supreme Court Case Nos. S168047, S168066 and S168078.

SHANNON MINTER National Center for Lesbian Rights 870 Market Street, Suite 370 San Francisco, CA 94102 Tel 415-392-6257 *Attorneys for Petitioners KAREN L. STRAUSS et al.* (S168047)	GLORIA ALLRED Allred, Maroko & Goldberg 6300 Wilshire Blvd, Ste 1500 Los Angeles, CA 90048 323-653-6530 *Attorneys for Petitioners ROBIN TYLER et al.* (S168066)
DENNIS J. HERRERA City Attorney THERESE M. STEWART Deputy City Attorney City Hall, Room 234 One Dr. Carlton B. Goodlett Place San Francisco, CA 94012-4682 Telephone: (415) 554-4708 Facsimile: (415) 554-4699 *Attorneys for Petitioner CITY AND COUNTY OF SAN FRANCISCO* (S168078)	JEROME B. FALK, JR HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN A Professional Corporation Three Embarcadero Center, 7th Floor San Francisco, CA 94111-4024 Telephone: (415) 434-1600 Facsimile: (415) 217-5910 *Attorneys for Petitioners City and County of San Francisco, Helen Zia, Lia Shigemura, Edward Swanson, Paul Herman, Zoe Dunning, Pam Grey, Marian Martino, Joanna Cusenza, Bradley Akin, Paul Hill, Emily Griffen, Sage Andersen, Suwanna Kerdkaew and Tina M. Yun* (S168078)
ANN MILLER RAVEL County Counsel Office of The County Counsel 70 West Hedding Street East Wing, Ninth Floor San Jose, CA 95110-1770 Telephone: (408) 299-5900 Facsimile: (408) 292-7240 *Attorneys for Petitioner COUNTY OF SANTA CLARA* (S168078)	ROCKARD J. DELGADILLO City Attorney Office of the Los Angeles City Attorney 200 N. Main Street City Hall East, Room 800 Los Angeles, CA 90012 Telephone: (213) 978-8100 Facsimile: (213) 978-8312 *Attorneys for Petitioner CITY OF LOS ANGELES* (S168078)

RAYMOND G. FORTNER, JR County Counsel 648 Kenneth Hahn Hall of Administration 500 West Temple Street Los Angeles, CA 90012-2713 Telephone: (213) 974-1845 Facsimile: (213) 617-7182 *Attorneys for Petitioner COUNTY OF LOS ANGELES* (S168078)	RICHARD E. WINNIE County Counsel Office of County Counsel County of Alameda 1221 Oak Street, Suite 450 Oakland, CA 94612 Telephone: (510) 272-6700 *Attorneys for Petitioner COUNTY OF ALAMEDA* (S168078)
PATRICK K. FAULKNER County Counsel 3501 Civic Center Drive, Room 275 San Rafael, CA 94903 Telephone: (415) 499-6117 Facsimile: (415) 499-3796 *Attorneys for Petitioner COUNTY OF MARIN* (S168078)	MICHAEL P. MURPHY County Counsel Hall of Justice and Records 400 County Center, 6th Floor Redwood City, CA 94063 Telephone: (650) 363-1965 Facsimile: (650) 363-4034 *Attorneys for Petitioner COUNTY OF SAN MATEO* (S168078)
DANA MCRAE County Counsel, County of Santa Cruz 701 Ocean Street, Room 505 Santa Cruz, CA 95060 Telephone: (831) 454-2040 Facsimile: (831) 454-2115 *Attorneys for Petitioner COUNTY OF SANTA CRUZ* (S168078)	HARVEY E. LEVINE City Attorney 3300 Capitol Avenue Fremont, CA 94538 Telephone: (510) 284-4030 Facsimile: (510) 284-4031 *Attorneys for Petitioner CITY OF FREMONT* (S168078)
RUTAN & TUCKER, LLP PHILIP D. KOHN City Attorney, City of Laguna Beach 611 Anton Boulevard, Fourteenth Floor Costa Mesa, CA 92626-1931 Telephone: (714) 641-5100 Facsimile: (714) 546-9035 *Attorneys for Petitioner CITY OF LAGUNA BEACH* (S168078)	JOHN RUSSO City Attorney Oakland City Attorney City Hall, 6th Floor 1 Frank Ogawa Plaza Oakland, CA 94612 Telephone: (510) 238-3601 Facsimile: (510) 238-6500 *Attorneys for Petitioner CITY OF OAKLAND* (S168078)

MICHAEL J. AGUIRRE City Attorney Office of the City Attorney, City of San Diego Civil Division 1200 Third Avenue, Suite 1620 San Diego, CA 92101-4178 Telephone: (619) 236-6220 Facsimile: (619) 236-7215 *Attorneys for Petitioner CITY OF SAN DIEGO* (S168078)	ATCHISON, BARISONE, CONDOTTI & KOVACEVICH JOHN G. BARISONE City Attorney Santa Cruz City Attorney 333 Church Street Santa Cruz, CA 95060 Telephone: (831) 423-8383 Facsimile: (831) 423-9401 *Attorneys for Petitioner CITY OF SANTA CRUZ* (S168078)
MARSHA JONES MOUTRIE City Attorney Santa Monica City Attorney's Office City Hall 1685 Main Street, 3rd Floor Santa Monica, CA 90401 Telephone: (310) 458-8336 Telephone: (310) 395-6727 *Attorneys for Petitioner CITY OF SANTA MONICA* (S168078)	LAWRENCE W. MCLAUGHLIN City Attorney City of Sebastopol 7120 Bodega Avenue Sebastopol, CA 95472 Telephone: (707) 579-4523 Facsimile: (707) 577-0169 *Attorneys for Petitioner CITY OF SEBASTOPOL* (S168078)
EDMUND G. BROWN JR. CHRISTOPHER E. KRUEGER MARK R. BECKINGTON Office of the Attorney General 1300 I St Ste 125 Sacramento, CA 95814-2951 (916) 445-7385 *Attorneys for Respondents MARK B. HORTON et al.* (S168047, S168078), *and for Respondents STATE OF CALIFORNIA et al.* (S168066)	